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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 333

MITCHEL BECK AND JOHN VOKIENER, CO-PARTNERS, TRADING AS MITCHEL BECK COMPANY,
Petitioners,

vs.

STEAMSHIP "VIZCAYA", ETC., AND ALL PERSONS CLAIMING ANY INTEREST THEREIN, AND COMPANIA ANONIMA MARITIMA UNION,

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS E. BYRNE, JR.,
KRUSEN, EVANS and SHAW,
Counsel for Petitioners.

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MITCHEL BECK AND JOHN VOKIENER, CO-PARTNERS, TRADING AS MITCHEL BECK COMPANY,

vs. *Petitioners,*

STEAMSHIP "VIZCAYA", ETC., AND ALL PERSONS CLAIMING ANY INTEREST THEREIN, AND COMPANIA ANONIMA MARITIMA UNION,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Mitchel Beck and John Vokiener, co-partners transacting business under the firm name of Mitchel Beck Company, respectfully prays that this Honorable Court may grant a writ of certiorari to the United States Court of Appeals for the Third Circuit which affirmed a judgment of the United States District Court for the Eastern Dis-

trict of Pennsylvania upon an appeal taken by your Petitioners from the judgment of the latter Court. The matter which the Petitioners request this Court to review goes only to the question of the amount of the judgment. The District Court assessed the damages in the sum of $4,733.85 and refused to enter judgment in the amount of approximately $13,000.00, the amount requested by your Petitioners.

Statement of the Case

In January of 1944 a shipment of 1850 bags of shelled almonds and filberts was loaded on board the Steamship "Vizcaya" in Spain. The original shipment was under a through bill of lading whereunder the shipments moved on two small river steamers from Alicante, Spain to Cadiz, Spain where they were transhipped aboard the "Vizcaya". The Petitioners herein were the consignees under the bills of lading.

The through bills of lading provided that the original carrier would tranship the cargo to the "Vizcaya" and the through bills of lading incorporated the "Vizcaya's" bills of lading by reference.

All of the through bills of lading were "clean" and acknowledged receipt of the goods in apparent good order and condition. When the cargo was loaded on the "Vizcaya" that vessel issued its own bills of lading and noted thereon exceptions to the condition of only ten of the bags. Upon arrival of the shipment at Philadelphia 291 bags were found to be damaged. The cargo was loaded without the protection of "dunnage", the bags being stowed one upon the other with a space of about one foot between the edge of the stow and steel side of the ship. In addition the evidence showed and the District Court found that the "Vizcaya" was unseaworthy.

Upon discharge of the cargo at Philadelphia it was found that of the 291 bags which were damaged at the time of

unloading, there were two distinct types of damage. The District Court (63 F. Supp. 898) found that the vessel was liable for one type, that which was caused when the bags in stow fell against the steel sides of the ship during the voyage. It found that the vessel was not liable for that damage which was evidenced by a clean sharp cut in the bags.

The matter was referred to a commissioner who awarded recovery to the libellants for the damage upon 47 bags only and denied them recovery for the balance.

Jurisdiction

The petitioners aver that the present matter is within the admiralty and maritime jurisdiction of the Courts of the United States and that §1254 of Title 28, United States Code grants jurisdiction to this Honorable Court to entertain and grant the present petition.

Question Presented

In an action to recover for loss of cargo carried on board a sea going vessel where the carriage is subject to the provisions of the United States Carriage of Goods by Sea Act, 46 U. S. C. A. 1300, et seq., and the evidence shows that the damage resulted from two independent causes, which party has the burden of proving the cause for which the carrier is liable where the cause of the two types of damage can be ascertained by examination.

Opinions Below

The Opinion of the District Court on the question of the liability is reported at 63 F. Supp. 898. The report of the Commissioner is not reported but the Opinion of the District overruling exceptions to the report of the Commissioner is reported at 88 F. Supp. 818. The Opinion of the

Court of Appeals affirming the final judgment of the District Court is reported at 182 F. 2nd 942.

Reasons Relied upon for the Allowance of the Writ

1. The Court of Appeals has decided an important question of maritime law arising under a statute of the United States in a manner which is inconsistent with prior decisions of this Court construing the same statute.

This Court has decided that where cargo on board an ocean carrier is discharged in a damaged condition and the loss results from two causes, for only one of which the carrier would be responsible, the burden nevertheless rests upon the carrier to show how much of the loss it should not be responsible for and if it fails the carrier bears the entire loss. That rule has been applied where it has been impossible to ascertain the proportion of the total damage which resulted from a cause for which the carrier would be responsible.

In the case at bar the two causes of the loss could have been ascertained by an examination but the damaged cargo was not inspected by either party in sufficient detail to prove the proportion of the loss which resulted from the cause for which the carrier was not responsible. The Courts below have refused to apply the rule of *The Vallescura*, 293 U. S. 296, to the situation in the case at bar and have attempted to draw what we consider to be the invalid distinction that here the rule does not apply because the cause of the loss could have been ascertained.

2. The Court of Appeals has decided a case involving an interpretation of maritime law in a manner which will have far-reaching effects upon future litigation in this field because it has cut down the burden which had always heretofore been applied to an ocean carrier where it delivered merchandise in a damaged condition.

WHEREFORE, your Petitioners respectfully pray that this Honorable Court may issue a writ of certiorari directed to the United States Court of Appeals for the Third Circuit commanding that Court to certify and send to this Court for review and determination upon a day certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket 10,157, *Mitchel Beck and John Vokiener, Co-partners Trading as Mitchel Beck Company* v. *Steamship "Vizcaya", etc., and All Persons Claiming any Interest therein and Compania Anonima Maritima Union*, and that the judgment of the said Court may be reviewed and reversed by this Honorable Court and that your Petitioners may have such other and further relief as may be just in the premises.

Respectfully submitted,

MITCHEL BECK and JOHN VOKIENER,
Co-partners Trading as
Mitchel Beck Company, Petitioners,
By THOMAS E. BYRNE, JR.,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement of the Case

A statement of the case has already been made in the Petition and to assist in achieving brevity, it will not be repeated here.

Argument

The Court of Appeals has Decided an Important Question of Maritime Law Arising Under a Statute of the United States in a Manner Which is Inconsistent with Prior Decisions of this Court Construing the Same Statute

In the case at bar the Respondent-Carrier loaded 1850 sacks of shelled almonds and filberts consigned to your Petitioners. Although the cargo originally moved under a through bill of lading, the Respondent-Carrier issued its own bills of lading and took exceptions to but ten sacks. Since the "Vizcaya's" bill of lading was subject to the United States Carriage of Goods by Sea Act, 46 U. S. C. A. 1300, et seq. (hereinafter referred to as COGSA), it must be assumed that the usual rule applied and that the issuing of a bill of lading without reference to the condition of 1840 out of 1850 sacks meant that the 1840 sacks were received by the Respondent-Carrier in apparent good order and condition. 46 U. S. C. A. 1300, 1303(4).

It is not disputed by the Respondent-Carrier that at the time the sacks were discharged at the completion of the ocean voyage at Philadelphia, 291 of them were damaged. The 291 damaged sacks had permitted their contents to leak out and the cause of this was, the District Court found,

(Findings of Fact 30 and 31, R. 113a) due to tears in the sacks arising from two causes. For damage resulting from one of the two causes the Court found that the Carrier was not responsible. Neither party sorted the 291 damaged sacks into the two categories fitting the two causes of loss as found by the District Court, and consequently at trial neither party was in a position to prove how many of the 291 sacks were damaged by reason of the cause for which the Carrier was responsible and how many were damaged by reason of the cause for which the Carrier was not responsible.

In *The Vallescura,* 293 U. S. 296 at 303, this Court said:

> "In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his undertaking, such as his immunity from liability for act of God or the public enemy. See Carver, Carriage by Sea (7th Ed.) c. I. The rule applies equally with respect to other exceptions for which the law permits him to stipulate."
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> * * * * * * *
>
> "If he delivers a cargo damaged by causes unknown or unexplained, which had been received in good condition, he is subject to the rule applicable to all bailees, that such evidence makes out a prima facie case of liability. It is sufficient, if the carrier fails to show that the damage is from an excepted cause, to cast on him the further burden of showing that the damage is not due to failure properly to stow or care for the cargo during the voyage" (293 U. S. 296 at 305).
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> * * * * * * *
>
> "Similarly, the carrier must bear the entire loss where it appears that the injury to cargo is due either

> to sea peril or negligent stowage, or both, and he fails to show what damage is attributable to sea peril" (293 U. S. 296 at 306).

We do not need to cite the many cases in which lower courts have followed the rule enuniciated by this Court in the *Vallescura* Decision. Suffice it to say that it has been universally applied until the slightly different circumstance of the present case served as a reason for an attempt to make a distinction which to us is not valid.

It is not a valid distinction to hold a carrier liable for the entire loss where the very nature of the loss makes it impossible for the carrier to distinguish that portion for which he would not be liable and to exonerate the carrier in a similar case where the proper division of the loss could have been made but was not. The Courts below distinguished the case at bar from the decision in *The Vallescura* by reason of the fact that in the case at bar the two causes of the damage could have been ascertained if an examination had been made in order to classify the 291 damaged sacks into the two categories which the District Court later found existed. Therefore, said the Courts below, these libellants cannot recover because they could have examined the damaged sacks and assigned a certain number to each category and since they did not they may not recover.

That reasoning overlooks entirely the basis for the *Vallescura* decision. The Respondent-Carrier had an equal if not a better opportunity to examine the 291 damaged sacks and assign each to its proper category. If the Respondent-Carrier had done so, it could claim that the present case was entirely outside the scope of the *Vallescura* rule. We urge that because the Carrier failed to do so will not serve it to the end that it can cast all unaccounted for loss upon the consignees. To do so completely robs of vitality the rule of the *Vallescura* decision.

We respectfully urge that where as here the cause of the loss can be ascertained, but neither the cargo owner nor the shipowner actually ascertained it, then the rule of the *Vallescura* case still applies because the shipowner had the burden of bringing himself within the exception and showing that for a particular portion of the damage he was not liable. To shift the burden of proof as the Courts below have done is to place the consignee of cargo in a position where he must anticipate the defenses which the carrier may raise and if he does not anticipate them successfully he then bears a loss.

In *Armco International Corporation* v. *Rederi A/B Disa*, 151 F. 2nd 5, the Court of Appeals for the Second Circuit said:

> " . . ., the ship failed to prove how much of the damage was caused by any negligence chargeable to the consignee. That alone is enough to charge her with all the damage."

In *Philippine Sugar Centrals Agency* v. *Kokusai, Kisen, Kabushiki Kaisha*, 106 F. 2nd 32, the Court said:

> ". . . ; but since some of it was certainly due to sweat, that will charge the ship with all, unless she can segregate the several contributions, which she cannot."

In our case the ship cannot segregate that portion of the loss which, under the findings of the District Court, would be chargeable to these libellants. In our case the ship cannot do so because it failed to evaluate the evidence which was available to it at the time the cargo was unloaded rather than because of any impossibility of obtaining evidence on the subject. If that is a valid distinction between the case at bar and the rule of the *Vallescura*, then of course the Courts below are right but if it is not then this case is one which this Court should review.

We respectfully point out that the Court of Appeals for the Third Circuit and the District Court for the Eastern District of Pennsylvania seem to apply a different rule than that applied in other Circuits and that which, in our judgment, is required to be applied if the rule of the *Vallescura* decision still retains vitality. Cf. *Thomas Roberts & Co.* v. *Calmar S. S. Corporation,* 59 F. Supp. 203, *The Norte,* 59 F. Supp. 881, and the decision in the case at bar with *Armco International Corporation* v. *Rederi a/b Disa, supra, Philippine Sugar Centrals Agency* v. *Kogusai, Kisen, Kabushiki Kaisha, supra,* and *Sanib Corporation* v. *United Fruit Co.,* 74 F. Supp. 64.

The case at bar seems to us to be in rather clear conflict with the decision by the Court of Appeals for the Second Circuit in *The Carso,* 53 F. 2nd 374. We say this because the distinction must necessarily be drawn in practice between the issuance of a clean bill of lading by an ocean carrier for goods which are sound to outward appearances but are in fact damaged or contaminated inside the containers and the case where, as here, the damage was readily apparent upon an examination of the package because the package itself (in this case a sack) is damaged and the contents have been lost for that reason. In *The Carso* there were three categories of damage and here there are two. The carrier in *The Carso* was relieved of liability only as to that cargo which was in fact damaged at the time of shipment but nothing about the external appearance of the goods or their wrappings suggested damage to the carrier. Where the damage is as readily apparent as the damage in this case then the carrier should be required to explain or account for that portion for which its negligence was not the producing cause and where is has failed to do so for whatever reason, the loss should fall upon the carrier.

The Carriage of Goods by Sea Act

Earlier in this brief we said that we presumed that the usual rule applied with respect to the effect of the bills of lading issued by the Respondent-Carrier. We based that statement upon the provisions of Cogsa, *supra.* Under that Act we submit that Respondent-Carrier was not at liberty to issue bills of lading acknowledging receipt of merchandise in good order and condition except for ten sacks and later contradict them where the damage claimed and proved was clearly damage of an external nature which was readily apparent to anyone upon a cursory examination. As the District Court points out (R. 103a) "the situation is one of first impression with reference to § 3(c) of The Carriage of Goods by Sea Act . . ." (46 U. S. C. A. 1303(3)(c)). We agree that the matter seems to be one of first impression although we suggest that subsection 3 of §1303 must be read in connection with subsections (4), (5), (6) and (8) of § 1303. Here the ship's own loading records (R. 33a, 34a, 35a) show that more than 3500 packages containing various types of nuts were loaded on the vessel and that only 62 out of more than 3500 were damaged at the time of loading. The bills of lading which the Respondent-Carrier issued indicated that but 10 out of the 1850 sacks consigned to these petitioners were damaged, yet the Courts below, failing to correlate the *Vallescura* decision with Cogsa, have exonerated the carrier except for the loss from 47 sacks. The reason is that the carrier failed to do that which an inspection would have enabled it to do—allocate the damage. Thus a carrier which does not examine is relieved of a large portion of the loss whereas the carrier which finds it impossible after a proper examination to allocate the loss bears it all, *The Vallescura, supra.*

That is the result which the improper interpretation of the rule of the *Vallescura* has brought about. We urge that the ratio decidendi of the *Vallescura* rule should require the carrier here to bear the burden of proof. Any other interpretation seriously weakens a rule which had heretofore been regarded as fundamental in this important field of Maritime Law.

The Petition should be granted.

Respectfully submitted,

THOMAS E. BYRNE, JR.,
Counsel for Petitioners.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOSEPH W. HENDERSON,

Proctor for Respondents.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

The statement of the case submitted by the petitioner does not present a complete summary of the relevant facts.

When the VIZCAYA arrived at Philadelphia in March, 1944, some of the bags of shelled almonds and filberts were found in the course of discharge to be slack and short of contents. Libellants notified the vessel's representatives of this situation and a joint survey was arranged. Before this joint survey could be made, the libellants loaded a considerable number of the bags into railroad cars and shipped them out of Philadelphia. Their surveyor retained some of the more badly damaged bags, which he set aside with other damaged bags taken from the lot which was still on the dock (R. 82a, 83a "Appendix for Appellants"; R. 13a "Appendix for Appellee"). This amounted to a group of 75 damaged bags which libellants' surveyor segregated for the purposes of the survey.

Inspection readily disclosed that the damage fell into two categories. One group showed a cut running lengthwise on the flat side, as if made by a sharp-pointed instrument. The other group showed tears accompanied by rust and paint marks indicating that they had been chafed by rubbing against the frames in the hold of the ship. Each slack bag was weighed to determine the loss of contents. The libellants made no attempt, however, to record the existence of cuts or tears in any of the slack bags which had not been so segregated by their surveyor (R. 13a "Appendix for Appellee"), and when respondents' surveyor suggested that the bags already shipped might be returned to Philadelphia for such examination the libellants' surveyor declined to do so because of the expense (R. 14a, 15a "Appendix for Appellee").

Out of the 75 bags included in the joint survey, the surveyors agreed that 47 bags were torn and 28 bags were cut. The testimony of the ship's officers, supported by their boat receipts, disclosed that stevedores employed by the initial carriers had damaged many of the bags at Cadiz by using cargo hooks (R. 3a, 4a, 5a, 6a "Appendix for Appellee"). Surveyors for both parties at the trial agreed that the bags which were cut could have been damaged in this way. The testimony further showed that some of the other bags were found to be torn by contact with the ship's hold due to lack of adequate stowage. The surveyors agreed that the bags which were torn and marked with paint and rust were in this category, and the two causes of loss were easily distinguishable (R. 55a, 65a, 70a "Appendix for Appellant"). Libellants' surveyor testified that the few bags he noticed containing both cuts and tears were placed in the "ship damage" category (R. 57a "Appendix for Appellant").

This shipment was transported under several "through bills of lading" from Alicante to Philadelphia, with a notation thereon that the merchandise was to be transshipped at Cadiz "to S. S. Vizcaya or substitute." Each of these

bills of lading contained a statement acknowledging receipt of the goods by the initial carrier in good order and condition. There was also a provision conspicuously printed in full capital letters reading "The responsibility of each carrier being limited to his own line" (R. 19a, 25a, 27a, 29a, 31a "Appendix for Appellant"). These bills of lading were subsequently negotiated and assigned to the libellants (R. 7a "Appendix for Appellee").

When the shipment was transferred to the VIZCAYA at Cadiz, the on-carrying vessel issued its own bills of lading showing receipt of the merchandise. They did not acknowledge receipt in good order and condition. On the contrary, they stated over the master's signature that the "weight, contents, quality and condition" were unknown. Specific exceptions were noted as to ten bags. These bills of lading were not negotiated or assigned. Libellants' representative testified at the trial that he knew nothing about them and did not even know the goods had been transshipped until after delivery at Philadelphia (R. 8a "Appendix for Appellee").

The learned trial judge found that carrier was responsible for slackage in the torn bags, but dismissed the claim insofar as it related to the cut bags. The ascertainment of damages was referred to a special commissioner under an interlocutory order reading in part as follows (R. 17a "Appendix for Appellee"):

> "ORDERED that claimant-respondent and Steamship VIZCAYA are not liable for damage in the first group of sacks, defined in Finding of Fact No. 30 as being those distinguished by a cut lengthwise on the flat side of each sack apparently cut by a sharp-pointed instrument, and it is further
>
> "ORDERED that claimant-respondent and Steamship VIZCAYA are liable for damage to the second group of sacks, defined in Finding of Fact No. 30 as being those distinguished by tears resulting from chafing of

the sack against the skin and/or frame of the VIZCAYA as evidenced by the rust and paint marks visible at the place of the tear, for the reasons set forth in Conclusion of Law No. 4."

The special commissioner, after full hearing, found that libellants were entitled to recover for the loss established in the "torn" bags set aside by the surveyors, but in the absence of further segregation into the two groups specified by the court he found that libellants had failed to prove any additional claim arising from slackage. Libellants contended that the burden of proof rested upon the respondents. This contention was rejected by the special commissioner in his final report, and subsequently by the District Court on exceptions to that report, and by the United States Court of Appeals for the Third Circuit on appeal.

In dismissing the libellants' exceptions to the report of the special commissioner, the trial judge reviewed the facts relating to the joint survey and reached the following conclusion in regard to the effect of the *Vallescura* case under the circumstances presented (88 F. Supp. 818, at page 820; R. 143a, 144a "Appendix for Appellant"):

> "It should be evident that under the holding of Schnell v. The Vallescura, supra, the claimant-respondent would not be liable for the entire shortage in the 291 slack bags, since it segregated its responsibility to at least seventy-five of them."

The Court of Appeals filed a brief Per Curiam opinion, as follows (182 F. 2d 942; R. 19 "Appendix for Appellee"):

> "This is an appeal by the consignees of a cargo of bags of nuts from a decree which awarded them some but not all of the damages they sought against a carrier. The matter was thoroughly discussed in a

full opinion by the court below. 88 F. Supp. 818 (E. D. Pa. 1949). We do not feel that we can add anything helpful to that discussion and so affirm on that opinion.

"The decree of the District Court will be affirmed."

ARGUMENT.

1. The Court of Appeals Properly Sustained the District Court in Holding That the Libellants Had the Burden of Proving What Damage They Had Suffered in Respect to the Bags Identified by Tears, as Distinguished From Those Identified by Cuts.

The testimony of the surveyors for both parties clearly shows, and the trial judge found, that the damaged bags could be readily separated into two groups according to the cause of slackage. One group showed sharp cuts as if made by a sharp-pointed instrument. These were shown by the evidence to have been damaged prior to shipment on the VIZCAYA. The other group showed tears and marks of rust and paint made by chafing against the skin and frames of the hold. The respondents were liable only for the bags in this category.

If these two groups of bags had been carried in different holds, or even in different vessels, they could not have been more effectively identified. This was obvious to the surveyors while the ship was still unloading at Philadelphia, before there was any adjudication of respondents' liability. Out of the 75 bags separated for examination, they agreed that 47 were torn and 28 were cut. All of the bags said to have been discharged with some loss of contents could similarly have been set aside, placed into the proper category, and weighed.

An entirely different situation was presented in *Schnell v. The Vallescura*, 293 U. S. 296 (1934), where the evidence established that damage to cargo resulted from *concurrence* of two possible causes, for one of which the vessel was liable and the other it was not. A shipment of onions had decayed during the voyage. It was found that the decay was due in part to necessary closing of the hatches and ventilators in bad weather, and in part to neglect in failing to open them in good weather. The ship was liable for the effects of insufficient ventilation in good

weather, but not in bad weather. As it was manifestly impossible to ascertain how much decay was due to one cause or the other, the court held that the ship was liable for the entire loss.

This rule, often cited, was properly applied by the same trial judge who heard the present case in *The Norte,* 69 F. Supp. 881, 887 (E. D. Pa. 1947), where a shipment of tartaric acid was caked by drippings from casks of olives stowed above it. The court found that the olive casks leaked partly from bad weather and partly from lack of dunnage. It was impossible to determine how much damage was due to each cause, and the carrier was held liable for the entire loss. Similarly, in *Sanib Corporation v. United Fruit Co.,* 74 F. Supp. 64, 66 (S. D. N. Y. 1947), the carrier was held liable for the entire loss in a shipment of banana powder which became gummy partly through the normal effect of temperature and partly from negligent exposure to water and steam. It was impossible to separate the damaged cargo into two parts according to these causes of loss because there was no way to identify the effects of one cause from the other.

The present case is very similar to *The Carso,* 53 F. 2d 374 (CCA 2, 1931), where a damaged cargo of cheese was readily separated into three groups, for two of which the ship was found not liable. The division into groups was made on the basis of the outward appearance of the containers, as in the case at bar.

The *Vallescura, supra,* holds that where cargo is damaged by two causes, for only one of which the carrier is liable, the burden is upon the carrier to prove the extent of loss due to the cause for which it is responsible. Even if the *Vallescura* rule applied to this case, and we contend that it is abundantly clear that it does not apply, the effect would be to impose upon these respondents the burden of showing which bags were damaged prior to shipment and those which were damaged in the course of the voyage. *The evidence shows, and the trial judge found, that re-*

spondents met this burden. It then became the burden of the libellants to establish how much of the contents was actually lost from the bags marked by tears, rust and paint.

Libellants' surveyor had no difficulty in making this division of the bags. Their surveyor and representative on the dock had full charge, control, custody and possession of all the bags as soon as they left the ship. Their weighmaster said that he weighed all the bags. If libellants failed to prove all of the damages to which they are entitled, it is due to their own neglect and lack of foresight. Even when respondents' surveyor suggested that the bags which they had already sent away should be returned for separation, their surveyor declined because of the expense. The logical inference is that the damage in the remaining bags attributable to the ship was known to be slight and not worth claiming.

Libellants have been awarded full damages for the loss they proved. The lower courts were correct in holding that the rule in the *Vallescura* case did not apply.

2. The Decision of the Court of Appeals Is Not in Conflict With Any Decision of This Court, Nor of the Court of Appeals of Any Other Circuit.

The decision of the Court of Appeals in no way conflicts with any decision of this Court or of any other Court of Appeals. The circumstances of the present case do not justify a departure from the general rule that a libellant must prove his damages.

The opinion filed in the Court below neither challenges nor conflicts with *Schnell v. The Vallescura, supra,* or the cases cited by libellants at page 10 of their present Brief.

In *Armco International Corporation v. Rederi A/B Disa,* 151 F. 2d 5, 8 (CCA 2, 1945), a number of iron plates forming part of a ship's cargo were negligently exposed to acetic acid. While some of these plates were still wet with acid they were removed from the vessel and negli-

gently mixed by the consignee with sound plates in railroad cars. The carrier contended that it was not liable for the damage occasioned by the consignee's negligence. The court held that the damage on shore was the direct result of the carrier's negligence, but in any event the carrier "cannot separate the damage done ashore from that done on board." In the case at bar, the carrier clearly identified the category of bags for which it was responsible as distinguished from the category for which it was not responsible.

In *Philippine Sugar Centrals Agency et al. v. Kokusai Kisen Kabushiki Kaisha,* 106 F. 2d 32, 36 (CCA 2, 1939), a cargo of sugar was damaged through inadequate ventilation and other causes. On the question of sweat damage arising from failure to provide sufficient circulation of air in good and bad weather, the court held that under *Vallescura* "this omission was enough to cast the ship for all sweat damage, for it would be impossible to disentangle the damage done during the storm from that done before and after it." In the case at bar, the respondents proved that the damage for which they were liable could readily be "disentangled" from the rest.

We have previously referred to *The Norte, supra,* and *Sanib Corporation v. United Fruit Co., supra,* in which two causes concurred to produce the result, as distinguished from the present case where the two causes did not concur. In *Thomas Roberts & Co. v. Calmar S. S. Corporation,* 59 F. Supp. 203, 210 (E. D. Pa., 1945), cited by the present libellants as an example of the misapplication of the *Vallescura* doctrine in the Third Circuit and the Eastern District of Pennsylvania, the point at issue in the case at bar was not under discussion. That suit presented an entirely different question as to whether wooden cases had acquired excess moisture before or after delivery to the carrier. The court held that the libellant had failed to prove that the cases were in good order and condition when delivered to the vessel.

The only other case mentioned by the libellants is *The Carso,* 53 F. 2d 374 (CCA 2, 1931). As we have already pointed out, the court there found that the damaged cases of cheese were readily separated into three groups or categories according to the outward appearance of the cases at time of delivery to the consignee. The same situation exists in the case at bar. The carrier was found liable for one category but not liable for the other two, thereby modifying the decision of the lower court which held the carrier liable for the whole damage. The appellate court imposed liability for the single group of cases on the ground that the ocean carrier, having issued a "clean" bill of lading which represented the contract of carriage and was later assigned to the libellant, was estopped to deny that the cases were in good outward condition upon receipt, in spite of contrary notations recorded by the mate. No question of estoppel arises in the case at bar, for the reason that the VIZCAYA bills of lading were primarily issued as receipts for the shipment, and these bills of lading were never negotiated, assigned, or even brought to the knowledge of the libellants until after delivery at Philadelphia (R. 8a "Appendix for Appellee").

The decisions of the lower courts in this action rest upon the manifest distinction between the facts in *Vallescura* and the case at bar. In *Vallescura* two distinct causes, one of which involved the carrier's liability and the other did not, concurred to produce cargo damage. In the instant case, the court found that the two distinct causes did not concur to produce a single effect on the cargo, but that they occurred at different times under conditions which left easily recognizable marks on the containers. Some bags were marked with tears, and other bags were marked with cuts. The carrier was found to be liable only for those bags marked with tears. All that was required of the libellants, as in any case of cargo damage, was to establish the shortage found in the torn bags for which respondents were liable.

Libellants have not shown any conflict in principle between this case and *Vallescura,* or decisions following that rule in other circuits. No settled rule of maritime law is endangered. The contention of the libellants, thrice rejected by the Courts below, seeks to extend the rule of the *Vallescura* case in circumstances where it has no proper application.

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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